UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JEFFREY DALE KETZEBACK, Defendant.	No. CR02-4091-DEO **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

TABLE OF CONTENTS

I. INTRODUCTION

This matter is before the court on the motion of the defendant Jeffrey Dale Ketzeback ("Ketzeback") to suppress evidence. Ketzeback filed his motion and a supporting brief on December 17, 2002 (Doc. Nos. 20 & 21). After receiving an extension

of time from the court, the plaintiff (the "Government") filed its resistance to the motion and a supporting brief on January 8, 2003 (Doc. Nos. 25 & 26). Ketzeback filed a reply brief on February 3, 2003 (Doc. No. 30).[1] Pursuant to the Trial Scheduling and Management Order entered October 7, 2002 (Doc. No. 9), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. Accordingly, the court held a hearing on the motion on February 4, 2003. Assistant United States Attorney Kevin Fletcher appeared on behalf of the Government. Ketzeback did not appear in person, but was represented by his attorney, Alexander Esteves.

The Government offered the testimony of Dickinson County Sheriff's Deputy Donald E. Gude. The following exhibits were admitted into evidence: **Gov't Ex. 1** (1 page), a Criminal History Log dated 1-19-2002, showing no criminal history for Norman Bice; **Gov't Ex. 2** (19 pages), Application for Search Warrant for Ketzeback's residence, dated February 26, 2002, with attachments; **Gov't Ex. 3**, Motion and Order for Dismissal in Case Nos. SM059090-098, *State of Iowa v. Norman Bice*, District Court of Dickinson County, Iowa, dated July 29, 2002; **Gov't Ex. 4**, Search Warrant for Ketzeback's residence, dated February 26, 2002; **Gov't Ex. 5**, Seized Property Receipt from search conducted at Ketzeback's residence; **Gov't Ex. 6**, diagram of Ketzeback's apartment drawn by Norman Bice.

The court now finds the motion has been fully submitted and is ready for consideration.

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[1]The court notes Ketzeback's reply was filed without requesting, or receiving, either an extension of the five-day time limit for reply briefs or leave to file the reply brief late. Further, Ketzeback's reply does not meet the requirements of Local Rule 7.1(g), which requires a reply brief "to assert newly-decided authority or to respond to *new and unanticipated* arguments made in the resistance." (Emphasis added.) For these reasons, the court will not consider Ketzeback's reply brief.

II. IS KETZEBACK ENTITLED TO A FRANKS HEARING?

In his motion, Ketzeback challenges the validity of a search warrant issued for the search of his apartment. The first issue before the court is whether Ketzeback has made the requisite showing for a hearing on his motion pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). *Franks* is the landmark decision allowing a defendant to challenge the veracity of an officer's sworn statement used in obtaining a search warrant. The case requires the court to hold a hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" 438 U.S. at 155-56, 98 S. Ct. at 2676. Further,

> [i]n the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 156, 98 S. Ct. at 2676.

The same principles are true for material the defendant alleges was omitted from (rather than included in) a warrant affidavit. The defendant must make a substantial preliminary showing that relevant information was omitted either intentionally or with reckless disregard for the truth, *and* that the omitted information, had it been included, would have rendered the affidavit insufficient to support a finding of probable cause.

The court will recite the pertinent facts in detail in the next section of this opinion. Based on these facts, the court finds Ketzeback has made a sufficient preliminary showing to warrant a *Franks* hearing.

III. FACTUAL BACKGROUND

On February 26, 2002, Dickinson County Sheriff's Deputy Donald Gude applied for a state search warrant to search Ketzeback's apartment. In his warrant application, Deputy Gude relied primarily on information provided by an unnamed "Cooperative Subject" ("CS")." Deputy Gude did not name the CS in the warrant application, representing that if the CS's identity were revealed, it would endanger the CS's safety and impair the CS's future use to law enforcement. *See* Gov't Ex. 2, p. 5. Deputy Gude's representations in the warrant application are set forth here verbatim:

> On 02/25/02 Deputy Don Gude & Rex Ondler interviewed a cooperative subject here after [sic] known as CS [who] told officers the following:
>
> That a Jeff, last name unknown[,] who lived at 1514 Hill Avenue Apt. 0[,] Spirit Lake, Iowa[,] was selling methamphetamine out of this apartment. On 02/23/02 the CS had scene [sic] Jeff selling methamphetamine to people. According to CS[,] Jeff sells teeniers [sic] and eight-balls of methamphetamine. Jeff had a clear zip lock baggie that contained a clear sandwhich [sic] bag that was tied at the top with a knot. Inside of this sandwhich [sic] bag was a pinkish colored rock substance that CS says is methamphetamine.
>
> CS also showed the officers a phone number that CS had for Jeff. It was 336-3179. In checking on the internet this number comes back to a Mike Ketzeback of 1514 Hill Avenue[,] Spirit Lake, Iowa[.]
>
> CS also said that this Jeff had been stopped by the local police in a cemetary [sic] and CS thought the police may have towed the vehicle that Jeff was driving.
>
> In attempting to varify [sic] the information that the CS provided law enforcement[,] they were able to find out the following:

> Officers were able to locate a list of tenants who live at Lakes Apartments in Spirit Lake, Iowa. According to this list[,] a Jane Caviness and Jeff Ketzeback live in Apartment #O.
>
> With this information officer's [sic] were able to find an N.DL for Jeffrey Dale Ketzeback who lived at 1514 Hill Avenue[,] Lakes Apartments # [sic] Spirit Lake, Iowa. On 12/26/01[,] Mr. Ketzeback received a citation for No Drivers [sic] License. Officers were able to find out Mr. Ketzeback was stopped by a cemetary [sic] by a Spirit Lake Officer Brian Stahl. Mr. Ketzeback was issued a citation and the vehicle he was driving was towed. The officer gave Mr. Ketzeback and a juvenile male a ride to 1514 Hill Avenue[,] Spirit Lake, Iowa.
>
> Officers ran a criminal history check on Mr. Ketzeback and found a felony conviction for Sale of toxic substances Children/Abuse Toxic Substance. It shows a felony conviction dated 06/19/00. It shows five years probation.
>
> Next the officers checked the Iowa Adult Probation and Parole office out of Spencer, Iowa. Officers found out that Jeffrey D. Ketzeback is on probation to Iowa Adult Probation and Parole Office.

Gov't Ex. 2, pp. 3-4.

In an "Informant's Attachment" submitted with the warrant application, Deputy Gude represented that the CS had "no motivation to falsify the information," "no criminal record," and the CS's information had "been corroborated by law enforcement personnel." Gov't Ex. 2, p. 5. Other attachments to the warrant application documented the information corroborated by the officers, including Ketzeback's criminal history, the Spirit Lake traffic citation, the Lakes Apartments tenant list showing Apartment 0 to be occupied by Jane Caviness and "Jeff Ketzebeck" [sic], and the internet search on the phone number provided by the CS.

David A. Lester, an Emmet County District Court Judge, issued the search warrant, noting on his endorsement that the confidential informant had not been used before, but his

information appeared credible for the following reason: "Information offered subjected the informant to criminal liability. Information provided was corroborated from other sources." Gov't Ex. 2, p. 19.

From the warrant application, it would have appeared to Judge Lester that a concerned citizen simply came to the police with information about a drug trafficker. The only thing questionable about the CS was that the CS evidently was present in Ketzeback's apartment at the time of an illegal drug transaction a few days before coming to the police.[2]

The following important information was not provided to Judge Lester in the search warrant application. On or about February 25, 2002, Deputy Gude arrested a man named Norman Bice (the "Cooperative Subject") on nine warrants for "theft fifth." Bice was arrested at his place of employment, handcuffed, and put into the back of Deputy Gude's vehicle for transport to the Dickinson County Sheriff's office. Bice was informed the charges arose from a complaint that Bice had used his former roommate's ATM card and PIN to obtain cash on nine occasions without the roommate's authorization. Bice stated his roommate had given him the ATM card and PIN, and told him he could use them to obtain cash. Bice offered to pay his roommate back for the money he had taken.

During the drive, Bice began to talk about his concern for his brother, who was using drugs heavily, and asked if the deputy was interested in information about illegal drug activities. Deputy Gude gave Bice his *Miranda* warnings, and then notified Deputy Rex Ondler, who was experienced in conducting interviews in drug cases, that Bice was on his way in and wanted to talk. After Deputy Gude and Bice arrived at the Sheriff's office,

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[2]Judge Lester noted that the information provided by the CS was reliable, in part, because it "subjected the informant to criminal liability." The presence of the CS in Ketzeback's apartment during this drug transaction is the only information in the search warrant application that potentially could have subjected the CS to criminal liability, although his mere presence in the apartment during the transaction ordinarily would not, without more, have constituted a criminal act. *See, e.g., United States v.. Hernandez*, 299 F.3d 984, 988 (8th Cir. 2002), *cert denied*, ___ U.S. ___, 2003 WL 99644 (Mem).

Deputy Gude and Deputy Ondler interviewed Bice. Bice said his brother had become involved with a drug dealer named "Jeff," who lived in the Lakes Apartments, Apartment 0, downstairs from the apartment where Bice was now living. Bice told the officers he had been in Jeff's apartment two days earlier, and had seen Jeff sell drugs to unidentified persons. He said Jeff had a plastic bag containing smaller plastic bags, each of which contained methamphetamine. Bice admitted he had purchased drugs from Jeff in the past, but claimed he had been clean for a month or two.

Bice said Jeff lived in the apartment with a woman named Jane. Bice drew a rough diagram of the inside of the apartment. He gave the deputies a piece of paper from his wallet that had "Jeff" and a telephone number written on it which Bice said was Jeff's phone number. According to Bice, Jeff had admitted to him that he had been convicted in Minnesota for selling drugs. Bice also reported hearing from Jeff about a recent traffic stop at a Spirit Lake cemetery that involved Jeff being cited for driving without a license. Bice said Jeff's car was towed, and a Spirit Lake police officer gave Jeff and a juvenile a ride back to the Lakes Apartments.

In an attempt to corroborate Bice's information, the deputies checked the phone number on the piece of paper Bice had provided and found the number was registered to a Mike Ketzeback at the Lakes Apartments address. They obtained a list of tenants for the Lakes Apartments and noted Apartment 0 was occupied by a Jeff Ketzeback and a Jane Caviness. The deputies verified that Jeff Ketzeback had been stopped by Spirit Lake police in a cemetery, his vehicle had been towed, and an officer had given Ketzeback and another individual a ride back to the apartment complex.

The deputies contacted the probation office for Clay County and learned Ketzeback was on probation for selling marijuana in Minnesota. His probation had been transferred to Clay County when Ketzeback moved to Iowa.

The deputies ran a criminal history report on Bice and it came back clean. They also verified that Bice lived at the Lakes Apartments, upstairs from Apartment 0.[3] On July 29, 2002, all charges against Bice were dismissed. *See* Gov't Ex. 3.

IV. ANALYSIS

A. Standard of Review

The United States Supreme Court has set the standard for review of a search warrant application, as follows:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli [v. United States,]* 309 U.S. [410,] 419, 89 S. Ct. [1509,] 590[, 21 L. Ed. 2d 637 (1969)]. "A grudging or negative attitude by reviewing courts toward warrants," *[United States v.] Ventresca,* 380 U.S. [102,] 108, 85 S. Ct. [741,] 745, [13 L. Ed. 2d 684 (1965)], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant [and] "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, [380 U.S.] at 109, 85 S. Ct. at 746.
>
> . . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960). *See United States v. Harris*, 403 U.S. 573, 577-583, 91 S. Ct. 2075, 2079-2082, 29 L. Ed. 2d 723 (1971). [FN10]

[3]Bice's name was not on the tenant list obtained by the deputies.

> [FN10] We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *Ventresca, supra,* 380 U.S. at 109, 85 S. Ct. at 746. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317 & n.10, 2331, 76 L. Ed. 2d 527 (1983).

Thus, the scope of this court's review of the search warrants in this case is limited to a determination of whether the judge had a "substantial basis" to issue the warrants. In conducting this review, the court is mindful that

> affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law have no proper place in this area." *Ventresca, supra,* 380 U.S. at 108, 85 S. Ct. at 745. . . . [M]any warrants are – quite properly . . . issued on the basis of nontechnical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings.

Gates, 462 U.S. at 235-36, 103 S. Ct. at 2331. As the Supreme Court further explained:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States,* 362 U.S. [257,] 271, 80 S. Ct. [725,] 736[, 4 L. Ed. 2d 697 (1960)]. We are convinced that this flexible, easily applied standard will

> better achieve the accommodation of public and private interests that the Fourth Amendment requires than does [the prior legal standard].

Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332. *See also United States v. Fulgham*, 143 F.3d 399, 400-01 (8th Cir. 1998) ("When we review the sufficiency of an affidavit supporting a search warrant, great deference is accorded the issuing judicial officer. *See United States v. Day*, 949 F.2d 973, 977 (8th Cir. 1991).")

Applying these standards, the court turns to its analysis of the warrant in question.

B. Reliance on Anonymous or Confidential Informants

As a preliminary matter, the court will examine the law relative to the circumstances under which probable cause may be supported by information from anonymous or confidential sources. Although the informant in the present case was known to the deputies, his identity was not disclosed to the judge reviewing the warrant application, nor were other facts disclosed that could have impacted his credibility.

The *Gates* Court's analysis is both controlling and directly relevant to the present circumstances, and this court therefore will quote at length from the *Gates* opinion as it applies to the case at hand.

Gates involved an anonymous, handwritten letter that alleged drug trafficking activities by Sue and Lance Gates of Bloomingdale, Illinois. The writer said Sue Gates would drive the Gateses' car to Florida, where it would be loaded with drugs. Then Sue would fly back to Illinois, while Lance flew to Florida, and then drove the drug-laden car back to Illinois. According to the writer, Sue was scheduled to fly to Florida on May 3. The writer also said the Gateses kept large amounts of cash and drugs in their basement, and they "brag about the fact they never have to work, and make their entire living on pushers." *Id.*, 462 U.S. at 225, 103 S. Ct. at 2325.

The letter was sent to the Bloomingdale Police Department, and was referred to Detective Mader for investigation. Mader verified that Lance Gates had an Illinois driver's license, and Mader obtained a current address for the Gateses. He then learned an "L. Gates" had a reservation to fly to Florida on May 5. Mader set up surveillance with DEA agents, who followed Lance from the Florida airport to a motel. They confirmed Lance had gone to a room registered to Susan Gates. The next morning, Lance and an unidentified woman (later confirmed to be Susan Gates) left the motel driving a car with Illinois license plates registered to a vehicle owned by the Gateses; they drove north on a highway "frequently used by travelers to the Chicago area." *Id.*, 462 U.S. at 226, 103 S. Ct. at 2326.

Mader prepared a warrant application and supporting affidavit that attached the anonymous letter and detailed his efforts to corroborate the information contained in the letter. Based on the application, a judge issued a search warrant for the Gateses' home and their automobile. The Supreme Court noted, "The judge, in deciding to issue the warrant, could have determined that the modus operandi of the Gates[es] had been substantially corroborated." *Id.* When the Gateses arrived home, they were met by Bloomingdale police, who searched the car's trunk and found approximately 350 pounds of marijuana. A search of the Gateses' residence yielded additional drugs, weapons, and other contraband.

The Illinois Circuit Court suppressed all the evidence, finding the warrant application "failed to support the necessary determination of probable cause to believe that the Gates[es]' automobile and home contained the contraband in question." *Id.*, 462 U.S. at 227, 103 S. Ct. at 2326. The Illinois Appellate Court and the Illinois Supreme Court affirmed. Relying on prior United States Supreme Court precedents,[4] the Illinois Supreme

[4]The Illinois court applied a two-pronged test derived from *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. (continued…)

Court concluded the anonymous letter, standing alone, was not a sufficient basis upon which the magistrate could find probable cause existed to believe contraband would be found in the Gateses' home and car, and further, Mader's affidavit did not contain sufficient additional information to support a finding of probable cause.

The United States Supreme Court reversed, abandoning the test applied by the Illinois courts,[5] and adopting instead a 'totality of the circumstances' approach:

> We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, . . . they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.
>
> This totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which

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[4](…continued)
2d 637 (1969). That test, which the Supreme Court rejected in *Gates*, required Mader's affidavit "to adequately reveal the 'basis of knowledge' of the letter writer – the particular means by which he came by the information given in the report, . . . [and] it had to provide facts sufficiently establishing either the 'veracity' of the affiant's informant, or, alternatively, the 'reliability' of the informant's report in this particular case." *Gates*, 462 U.S. at 228-29, 103 S. Ct. at 2327.

[5]*See* note 4, *supra.*

> reasonable and prudent men, not legal technicians, act." *Id.*, [338 U.S.] at 175, 69 S. Ct. at 1310. Our observation in *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard:
>
> > The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same – and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> As these comments illustrate, probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. As we said in *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612 (1972), "Informants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*

Gates, 462 U.S. at 230-32, 103 S. Ct. at 2328-29 (footnotes omitted).

The Court surveyed its earlier cases discussing "the limits beyond which a magistrate may not venture in issuing a warrant." *Gates*, 462 U.S. at 239, 103 S. Ct. at 2332. The Court noted that conclusory statements do not provide an adequate basis to support issuance of a warrant. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id.*, 103 S. Ct. at 2333. However, the Court explained its adoption of a "totality of the circumstances" approach "in [no] way lessens the authority

of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant[.]" *Id.*, 462 U.S. at 240, 103 S. Ct. at 2333.

In particular, the Court held a magistrate may rely on hearsay, "'so long as a substantial basis for crediting the hearsay is presented.'" *Id.*, 462 U.S. at 241-42, 103 S. Ct. at 2334 (quoting *Jones, supra*, 362 U.S. at 269, 80 S. Ct. at 735). The requisite support for hearsay information may be reasonable corroboration by law enforcement, including an officer's own observations, and efforts to corroborate an informant's report. *Gates*, 462 U.S. at 242, 103 S. Ct. at 2334.

The Court then examined certain types of corroboration that have been deemed adequate to support an informant's tip. These include, among other things, an officer's personal verification of the information, whether the informant has previously given reliable information, the degree of detail supplied by an informant, whether the information was publicly available, whether the activities described were seemingly innocent, and whether the informant was admitting to criminal activity himself in providing the information. *See id.*, 462 U.S. at 239-46, 103 S. Ct. at 2332-36 (citing, *inter alia*, *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), as "the classic case on the value of corroborative efforts of police officials"). The Court found "the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *Gates*, 462 U.S. at 254, 103 S. Ct. at 2335-36. Thus, the Court reasoned, "[i]f the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gates[es]' alleged illegal activities." *Id.*, 103 S. Ct. at 2336.

Citing the *Gates* "totality of the circumstances analysis," the Eighth Circuit examined reliance on information from confidential informants in *United States v. Fulgham*, 143 F.3d 399 (8th Cir. 1998). Fulgham challenged a search warrant on the basis it was not

supported by probable cause. In the officer's affidavit supporting the warrant application, the officer provided information from a confidential informant that a black male was selling crack cocaine from a residence. The informant claimed to have been present and personally witnessed cocaine sales at the residence. The officer indicated the confidential informant was reliable for several reasons:

> [H]e had known this confidential informant for one year, and . . . the informant was a mature individual, was a person of truthful reputation, had no motivation to falsify information, had not given false information in the past, had supplied information in the past more than ten times, and had helped supply information leading to two search warrants, five arrests, and the discovery and seizure of stolen property and drugs or other contraband.

Id., 143 F.3d at 400.

In addition, the officer described two ways in which the informant's information had been corroborated: the officer's review of police records of other criminal activity at the residence, and information from a second confidential informant who also claimed to have witnessed cocaine sales at the residence. *See id.*

The Eighth Circuit explained:

> When an affidavit contains information provided by a confidential informant, a key issue is whether that information is reliable. *See United States v. Brown*, 49 F.3d 1346, 1349 (8th Cir. 1995). "Information may be sufficiently reliable to support a probable cause finding if the person providing the information has a track record of supplying reliable information, or if it is corroborated by independent evidence." *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993) (citing *Draper v. United States*, 358 U.S. 307, 313, 79 S. Ct. 329, 333, 3 L. Ed. 2d 327 (1959)). In the present case, the information was shown by [the officer] to be reliable in both ways. [The officer] represented in his affidavit that past information given by the first informant had proved to be reliable, resulting in several arrests and the recovery of stolen

> property and illegal substances. In so doing, [he] established that the first informant had a reliable track record.

Fulgham, 143 F.3d at 401. On the issue of corroboration, the court noted

> the information given by the first informant was corroborated with specific, consistent details provided by the second informant. In fact, the two informants' tips were reciprocally corroborative, rendering their information [reliable] enough to support a finding of probable cause. *See United States v. Jackson*, 67 F.3d 1359, 1365 (8th Cir. 1995) (holding that information from an informant without a track record could be corroborated with information by an informant with a reliable track record, thereby establishing probable cause), *cert. denied*, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996).

Id. The court concluded "the affidavit provided a substantial basis upon which the issuing magistrate could conclude that probable cause existed." *Id.*

In numerous other instances, the Eighth Circuit has affirmed the issuance of warrants and wiretaps on the basis of information provided by anonymous or confidential informants. In each case, either an informant was shown to be reliable, or the information was corroborated by independently-obtained information. In *United States v. Fairchild*, 189 F.3d 769 (8th Cir. 1999), a wiretap was issued based on information from six confidential informants, corroborated by investigative means that were detailed in the supporting affidavit. In *United States v. Pitts*, 173 F.3d 677 (8th Cir. 1999), a search warrant was issued based on information from a confidential informant about drug shipments to the defendant, bolstered by a controlled drug buy and officers' personal observations of the defendant's activities. In *United States v. Buchanan*, 167 F.3d 1207 (8th Cir. 1999), a confidential informant's information was corroborated by a known informant who made statements against his own penal interest.

In *United States v. Goodson*, 165 F.3d 610 (8th Cir. 1999), the court noted:

> We have repeatedly held that "'[t]he statements of a reliable confidential informant are themselves sufficient to support

> probable cause for a search warrant'" and that "'[t]he reliability of a confidential informant can be established if the person has a history of providing law enforcement officials with truthful information.'" *United States v. Formaro*, 152 F.3d 768, 770 (8th Cir. 1998) (quoting *United States v. Wright*, 145 F.3d 972, 974-75 (8th Cir.), *cert. denied*, 525 U.S. 919, 119 S. Ct. 272, 142 L. Ed. 2d 224 (1998)).

Goodson, 165 F.3d at 614. Three confidential informants corroborated each other's information, and one of the informants had a track record of reliability. *See id.*

These are only a few of the many cases in which the Eighth Circuit has examined the issue of when a warrant may be issued based on information from a confidential or anonymous source. What seems clear from the case law is that an informant's reliability, although not dispositive, is a key factor in the analysis. Confidential informants may corroborate each other in some cases, or an informant's information may be corroborated by law enforcement, but the warrant application should contain at least some reference to the way in which the information was corroborated, and what specific information was corroborated. *See, e.g.*, *Mueller v. Tinkham*, 162 F.3d 999, 1003 (8th Cir. 1998) ("The information provided by an informant is sufficient to support a probable cause finding if the person has provided reliable information in the past or if the information has been independently corroborated[,]" citing *Walden v. Carmack*, 156 F.3d 861, 870 (8th Cir. 1998)); *United States v. Wilson*, 964 F.2d 807 (8th Cir. 1992) (informant's statements were against penal interest; information corroborated by agent's observations); *United States v. Little*, 735 F.2d 1049 (8th Cir. 1984) (affidavit did not attest to informant's reliability; no corroboration of significant details); *see also Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) (in context of investigatory stop of defendant's vehicle based on informant's tip, Court held absent sufficient corroboration by police, the tip lacked necessary indicia of reliability to determine informant's honesty, or reliability of information); *United States v. Danhauer*, 229 F.3d 1002 (10th Cir. 2000) (either the

informant's information should be independently corroborated or the informant's veracity determined).

In summary, this court must determine whether the judge who issued the warrant in question had a "substantial basis" to issue the warrant. This determination must include not only the information supplied for the judge's review, but also whether material information known to the affiant was omitted that, had it been included, would have rendered the affidavit insufficient to support a finding of probable cause.

C. Application of Law to the Present Case

In light of the case law discussed above, the warrant application in the present case is problematic to the extent it omits information that was material to the reviewing judge's determination of the confidential source's credibility. To summarize the evidence, Bice was arrested on multiple warrants for dishonest activities. While he was handcuffed in the back of Deputy Gude's car and being transported to the Sheriff's office, Bice, according to the deputies, suddenly and without any questioning or urging began discussing his brother's drug addiction, and volunteered information about a drug dealer in his apartment building. Notably, Bice previously had not contacted law enforcement to report his concerns about his brother or the drug dealer. Further, he had purchased drugs from the dealer himself.

None of this information was provided in the warrant application. On the contrary, the application reads as though a pristine, concerned citizen simply showed up and reported to law enforcement that he had seen drug activities going on in a neighbor's apartment. The application does not disclose that Bice was facing multiple charges involving dishonesty, that he was in custody at the time he made these statements, or that he was, or at least had been, a drug user.

Based on the standards set forth by the *Franks* Court, this court finds Ketzeback has shown by a preponderance of the evidence that the omission of these material facts from the

warrant application constituted reckless disregard. Had the reviewing judge been presented with all the material facts, the court finds the judge would not have found probable cause existed to issue the warrant without further corroboration that Ketzeback likely was engaging in criminal activities. On this basis alone, the warrant should be voided and the fruits of the search suppressed.

Looking further at the probable cause determination, the information provided by Bice that was corroborated by law enforcement consisted primarily of matters that were publicly available. The deputies verified Ketzeback's name, address and telephone number; the issuance of a citation for driving without a license; and the fact that Ketzeback was on probation from a Minnesota felony charge of selling marijuana. The deputies did nothing to verify that drug trafficking activities were taking place in or around Ketzeback's apartment. They did no surveillance of the apartment, they did not attempt a controlled buy of drugs, and they had no other witness statements to corroborate Bice's information.

The *Gates* Court explained the task of an issuing judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 238, 103 S. Ct. at 2332. Clearly, the types of information omitted from the warrant application here would affect the veracity of the confidential source, and would have affected the reviewing judge's common-sense decision as to whether evidence of criminal activity would be found in Ketzeback's apartment. The charges pending against Bice would provide a motive for him to lie.[6] The court finds this

[6]The Government argues Bice's credibility could not be impugned by charges that were merely pending, but only by a conviction on those charges. The court disagrees. It appears from the evidence that Bice offered the information about Ketzeback's alleged drug dealing to get himself out of a tight spot with regard to fraudulently using his roommate's ATM card nine different times. It is disingenuous for (continued…)

information, together with the deputies' lack of evidence to corroborate any criminal activity by Ketzeback, would have resulted in the reviewing judge declining to issue the search warrant.

D. Leon Analysis

The above findings normally would not end the inquiry because in most circumstances, even if the warrant was invalid, if the deputies reasonably and in good faith relied on the search warrant, then evidence obtained from the search should not be suppressed. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

Id., 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

In the present case, the search warrant was obtained on the basis of a "bare bones" affidavit by the *same* officers who executed the search warrant. The relevant question is

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[6](…continued)
the Government to argue the charges were moot because they later were dismissed, if the dismissal resulted from the information Bice provided to law enforcement.

whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:
>
> > "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."
>
> The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:
>
> > "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

In this case, the court finds the law enforcement officers had, or properly may be charged with having, the requisite knowledge to support the application of the exclusionary rule. The material omissions in the affidavit supporting the warrant were either intentionally or negligently designed to mislead the reviewing judge into believing the confidential

source was merely a concerned citizen, rather than a defendant in custody who was facing numerous charges, and who admittedly was a drug user.

Considering the totality of the circumstances, the court finds no substantial basis existed for issuance of the warrant. Accordingly, the court **recommends that Ketzeback's motion be granted**, and all evidence resulting from execution of the warrant be suppressed.

V. CONCLUSION

IT IS RECOMMENDED, unless any party files objections[7] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Ketzeback's motion to suppress evidence (Doc. No.20) be **granted**, in accordance with the recommendations set forth above.

IT IS SO ORDERED.

DATED this 10th day of February 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[7]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).